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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 646

THE WANDERER

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner-Appellant Below,

versus

WILBURN BOAT COMPANY, ET AL.,

Respondents-Appellees Below.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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In the petition for certiorari filed in this Court, the petitioner presented as grounds for granting a writ of certiorari the conflict between the decision of the Court of Appeals below and the decisions of the 2nd, 8th and 9th Circuits cited therein and the general importance in the administration of the federal judiciary of the proper effect and handling of stipulations that a case be tried solely upon evidence admitted and judicial admissions made at an earlier trial. This Court by its order denying certiorari had indicated that it does not consider these grounds as warranting review by this Court.

In keeping with Rule 58 of this Court, the petitioner limits this petition to other substantial grounds available to petitioner although not presented in the petition for certiorari.

The decision below is in conflict with the decisions of the highest Court of the State of Texas on a matter of state law.

As noted in the petition for certiorari, upon remand of the case to the District Court following the earlier decision of this Court, the parties stipulated as follows:

"STIPULATION.

"It is stipulated that this case shall be tried solely on the evidence admitted and judicial admissions of fact heretofore made in this cause in this Court, on which judgment was entered on December 13, 1951."

The Court of Appeals held:

(1) that this stipulated record did not contain evidence on which the Court could base a finding of doing business in Texas. (Petition, Appendix p. 3a);

(2) that the District Court could not on that record take judicial notice that the petitioner was doing business in Texas when the policy attached. (Petition, Appendix p. 4a);

(3) that, there being no evidence or admission in the stipulated record that petitioner was doing business in Texas when the policy attached, the Texas statute, relied upon by respondents, as the basis for applying Texas law to determine liability under the policy, was inapplicable and the judgment based on Texas law could, therefore, not stand. (Petition, Appendix p. 4a).

Petitioner does not attack these holdings. Respondents have not attacked and have no standing to attack these holdings. (See p. 2 of Petitioner's Reply Brief in support of Petition for Certiorari).

Nevertheless, the Court of Appeals did not do the only thing justified on the stipulated record—direct judgment in petitioner's favor. Instead, relying on its general authority to reverse for a new trial where the record does not include sufficient evidence, it reversed and remanded for a new trial. None of the authorities cited by the Court of Appeals as authority for its action, however, involved a stipulation that the case be tried solely on evidence already in the record.

True, the type of order which may be entered by a federal Court of Appeals is a matter of federal law, in the sense that its power to act is founded upon a federal statute. Similarly, matters of procedure governing the trial of a cause in federal district courts are governed by federal law. In its petition for certiorari, the petitioner took the position that the effect of, and the proper method for relieving a party from, a stipulation that a case be tried solely upon certain evidence in the record of a former trial were matters of federal procedural law, review of which was warranted by the existing conflict between the Court of Appeal on these questions. This Court, in denying certiorari, however, may well have been of the view that these matters relate to the question of what evidence shall be admitted in a trial in a federal court. Absent a specific federal statute or established federal equity practice favoring the admissibility of certain evidence, such matters are to be determined under the applicable state law. Rule 43 (a) R. of Civ. Proc., 28 U.S.C. 1652. This Court may have concluded that the action of the Court of Appeals, in reversing for

a new trial at which the parties are to be permitted to offer any evidence in support of their respective positions, despite the stipulation that the case be tried solely on the evidence and judicial admissions already in the record, raised only a question of state law, correctly applied by the Court of Appeals. This is not the case.

The Texas law is clear that:

(1) Stipulations that a case be tried solely on certain facts are binding on the parties and the Court. The trial court may not, without expressly vacating the stipulation for cause, assume that other facts exist, nor may an appellate court, in the face of such a stipulation, reverse for the purpose of hearing evidence other than that stipulated.

(2) Stipulations that a case shall be tried solely on certain facts may not be vacated and set aside except by the trial court, on timely motion by one of the parties, and after a showing sufficient to support a finding that the party seeking to be relieved of the stipulation would suffer substantial injustice by reason of its enforcement and that the other party would not be prejudiced by its being set aside, but could be placed in the same position as if the stipulation had never been executed.

Aetna Life Ins. Co. v. *Smith*, 293 S.W. 243 (Tex. Civ. App., 1927) was a suit under the Texas Workmen's Compensation Act. The plaintiff-appellee was injured in the course of his employment by reason of a piece of hot steel striking the back of his right hand. The Industrial Accident Board made an award to which the defendant objected. It filed suit. The parties stipulated the facts upon which the case should be tried and further agreed:

"That this agreement constitutes a complete statement of all the facts in this case, with the exception of the extent of the disability to claimant's right hand."

The plaintiff-appellee offered in evidence testimony of injuries outside the terms of this agreement upon which the jury's verdict and judgment were rendered. The Court on appeal noted:

"The agreed statement was offered in evidence, and the record does not disclose objection thereto on the part of appellee in any particular of mutual mistake or otherwise. Neither does the record show any alteration or change or rescission of the agreed facts in any wise."

The Court accordingly held:

"Consequently, as the record stands, in no wise could the inquiry have been extended beyond the terms of the agreement by either party . . .

"In view of this agreed statement of facts, upon which the rights and liabilities of the parties were to be determined, the judgment must be reversed, because of the assigned errors in admitting, over objection, evidence of injuries wholly outside the agreed facts, and in not confining, as requested, the issues to the jury to the extent of the specific injury stated."

The Supreme Court of Texas has expressed identical views. In *Bennett* v. *Romos*, 252 S.W. 2d 442, (Tex., 1952), the issue was the validity of a certain tax foreclosure deed to plaintiff's predecessor in title in a trespass to try title action. One defendant, Nebarez, had owned a one-half undivided interest in the real estate in 1944. Prior thereto, in 1934, he had been declared legally incompetent, and in 1944, while still adjudged incompetent, he joined in a deed of the real estate to defendant's predecessor in title. In 1950, after being declared legally

sane, he confirmed this deed. The plaintiff contended that the 1944 deed was totally void, not just voidable, on the ground that there was an active guardianship for Nebarez in 1944. The Court stated at p. 449:

> "But be this as it may, the stipulation of facts before us agrees '. . . that the following constitute the facts in this case, except the documents to be introduced in evidence', and neither the recited facts nor the documents anywhere mention the existence of a guardian, active or inactive. When respondents thus expressly undertake to set out all the facts of interest to them, and the terms of the stipulations disclose that they must have examined in detail the record of both adjudications, would it not approach the officious for us to suggest that they made what is a negligent oversight if it be true that the existence of a guardianship has substantial bearing on the case. There is no presumption of guardianship from the mere recited fact of adjudication of insanity, and lawyers rarely rely on mere presumptions to state matters of importance to them, when it would be quite as easy to state the facts themselves."

and at pages 449-50:

> *"Undoubtedly the record does not permit us to hold, even did the decisions so justify, that the 1944 deed was a nullity because an active guardianship then existed—and thus affirm the result below as to the Nevarez half interest. Nor can we say that even a fact issue was raised on the point. Nor do the circumstances warrant us in sending this arm of the case back for a new trial, with the idea that new facts may be developed, which the interested parties themselves have not even suggested, which apparently do not exist and which might well not make any difference if they should exist."**

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* Italics added.

The Court reversed and rendered judgment on the stipulated record in favor of the defendant appellees. The dissenting opinion of Mr. Justice Smith specifically suggested that the Court should remand for a new trial to hear additional evidence on this point in the teeth of the stipulation (as the Court of Appeals below did), but the Texas Supreme Court held that such action was not warranted in the face of such a stipulation.

Similarly, in *Hutcherson* v. *Sovereign Camp, W. O. W.*, 251 S.W. 491, (Tex., 1923), the Supreme Court was dealing with a suit on a life insurance policy defended by the insurer on the basis that the beneficiary had murdered the assured. The case was tried on an agreed statement of facts which recited that only the stipulated facts should be considered. The Court held the insurer had failed to prove on the basis of the stipulated facts that the killing of the assured was not accidental, stating at page 492:

> "When a case is so tried, the agreed statement is to be considered in the light of well-defined legal limitations, and in the nature of a special verdict: it admits there is no dispute as to the facts, and constitutes a request by each of the litigants for a judgment, which each contends arises as a matter of law from the agreed facts.
>
> "*The courts are without power, in the absence of a provision in the agreed statement providing otherwise, to draw any inference, or find any facts, not embraced in the agreement, unless, as a matter of law, such other inferences are necessarily compelled: and the judgment of the court must only declare the law which necessarily arises from the facts agreed upon* . . .*
>
> "As a general rule, conclusions of fact by the trial court have no office in the trial of a case upon an agreed statement of facts."

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* Italics added.

Accord, *Darr* v. *Johnson*, 257 S.W. 682, (Tex. Civ. App., 1923); *Ocean Accident & Guarantee Corporation* v. *Riggins*, 291 S.W. 276, 278, (Tex. Civ. App., 1927); *Texas Sporting Goods Co.* v. *Texas Gulf Sulphur Co.*, 81 S.W. 2d 805, 808, (Tex. Civ. App., 1935); *Cousins* v. *Cousins*, 42 S.W. 2d 1043, 1046, (Tex. Civ. App., 1931); *Newman Bros. Drilling Co.* v. *Stanolind Oil & Gas Co.*, 296 S.W. 2d 567, 570, (Tex. Civ. App., 1956).

Similarly, the Texas courts have clearly held that a party may be relieved of a stipulation only upon a showing of serious injury if the stipulation in enforced and proof that the other party will not be prejudiced by setting it aside. If the other party has acted in reliance upon the stipulation it may not be set aside unless he can be restored to his position prior to his entry into the stipulation. *Porter* v. *Holt*, 11 S.W. 494, (Tex., 1889); *Early* v. *Burns*, 142 S.W. 2d 260, (Tex. Civ. App., 1940). These cases unambiguously state the law of Texas applicable to the decision of the District Court and Court of Appeals below.

With these well established rules let us compare the action of the Court of Appeals below. That Court was confronted with a record (upon which the parties had stipulated that the case should be solely tried) which the Court itself held contained no evidence whatsoever that petitioner was doing business in Texas when the policy of fire insurance sued on was transferred to the Wilburns or their corporation. On this record no other holding was possible except that petitioner was not doing business in Texas at that time, in which event it is conceded (and the Court of Appeals so held) that Texas law is inapplicable to the construction of this policy. And, if Texas law is inapplicable, Illinois law (the state where the contract was entered into and was to be performed)

is conceded to be the applicable law. (Petition, Appendix p. 2a). Under Illinois law the breaches of warranty proved by petitioner are admittedly valid defenses. Accordingly, *on the record* petitioner was entitled to judgment in its favor. All this the Court of Appeals itself held. (Petition, Appendix pp. 2a, 3a). With the record entitling petitioner to judgment and a stipulation that the case should be decided solely upon that record, the Court of Appeals nevertheless remanded for a new trial for the purpose of permitting the respondent to offer other evidence not permitted to be offered under the terms of the stipulation. This action was taken:

(1) despite the fact that the respondents at no time in this litigation have asked either the District Court or the Court of Appeals to vacate or modify the stipulation;

(2) the respondents have made no showing before the District Court or the Court of Appeals of any basis whatsoever for modifying or setting aside the stipulation;

(3) the petitioner in neither court was given any opportunity to show the serious injury which will result to it by reason of setting aside the stipulation;

(4) the Court of Appeals did not even specifically address itself to the interrelationship between the stipulation and its action in reversing for a new trial at which the parties will not be bound by the stipulation.

This action is in direct conflict with the law of Texas as set forth in the Texas decisions cited herein. Further, this Court may possibly have felt that there was some

doubt as to the scope of the stipulation—whether or not it was intended to be applicable to all further proceedings in the case. This stipulation is far different from a stipulation that a particular fact is true for the purposes of a particular trial. At a second trial such a stipulation may no longer be binding. Here, however, the parties stipulated that the case should be tried *solely* on the record made at the first trial. On that record petitioner was admittedly entitled to judgment. There is, therefore, no basis for granting a new trial. It is hardly reasonable to grant a new trial in the face of the stipulation solely because the stipulation was not intended to apply upon such a new trial. In any event the Texas Courts have held that stipulations as to evidence apply not only to the trial wherein made, but to all subsequent trials *unless the agreement expressly states that it is applicable to only a particular trial. Lee* v. *Wharton*, 11 Texas 61 (1853) *Villareal* v. *Passmore*, 145 S.W. 1086, (Tex. Civ. App., 1913).

To allow respondents at this late date, nearly four years after the stipulation was executed, to put in new evidence in conflict with the stipulation, will not achieve justice in this case. Respondents, prior to entering into the stipulation, knew that to recover under the Texas law they had to prove petitioner was doing business in Texas when the policy attached. They demonstrated their full understanding of the significance of such proof by attaching a copy of a purported certificate of authority of petitioner to do business in Texas to their brief in this Court on the earlier appeal, *before the stipulation was entered into.* They then knew the legal issue, they then had whatever evidence on the point they now possess, and they knew the significance of such evidence, yet they then proceeded to solemnly stipulate that the case be tried without such evidence. To now strike down the stipulation

leaves the respondents in possession of a substantial measure of the advantage they sought by the stipulation, but frees them of its burdens. Such action deprives petitioner of the protection of the stipulation after it is no longer possible to restore it to its position prior to its entering into the stipulation. Such action, because manifestly unjust, has been declared improper by the courts of Texas as well as other federal Courts of Appeal.

CONCLUSION.

This Court should grant this petition for rehearing and a writ of certiorari to review the action of the Court of Appeals in deciding a matter of the state law of Texas in a manner clearly contrary to the law of that state as declared by its highest court.

Respectfully submitted,

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CERTIFICATE.

The undersigned hereby certifies that the above Petition for Rehearing is presented in good faith and not for delay and that the Petition for Rehearing is confined to other substantial grounds justifying this Court in granting a writ of certiorari to review the decision below, available to petitioner, although not previously presented to this Court.

EDWARD B. HAYES